

Exhibit 36

**Excerpt of Appellee's Brief in
Morales v. Calderon, Ninth Circuit Court of Appeals
Number 99-99020**

99-09020

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES,

Petitioner-Appellant,

CAPITAL CASE

v.

ARTHUR CALDERON,

Respondent-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. CV 91-0682-DT
The Honorable Dickran Levizian, Judge

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declarations and circumstantial evidence to try to show that the prosecutor actually knew he was presenting false testimony. All were properly rejected by the district court.

A. The State Court Proceedings Re Bruce Samuelson

As noted earlier, Bruce Samuelson was a jailhouse informant. Samuelson entered the case during the later stages of the pre-trial proceedings. In early November 1982, almost two years after Terri Winchell's murder, and just before the case moved from San Joaquin County to Ventura County on a change of venue motion, Samuelson was arrested in Arizona in possession of a stolen car. On November 10, 1982, Samuelson was returned to San Joaquin County in custody and charged with one count of car theft, two counts of receiving stolen property, and three counts of forgery. There, he was housed in protective custody with Morales because he had been in jail before and, by Samuelson's own admission, had been previously been labeled both a "cop" and a "snitch" by other inmates. ER D at Exh. A, ER 28 11RT 2332-33, 2364-67, 2373, ER 77 at 238-42.

Sometime around November 15, 1982, Samuelson, who was acting as his own lawyer on his six-count case, began talking to Morales about his case, answering legal and strategic questions Morales had. Another inmate facing capital murder charges, James Mahoney, was housed nearby and witnessed these

discussions. In early December, Samuelson sent a handwritten note to the prosecutor in this case, who was also assigned to Samuelson's case. ER C at Exh. J, ER D at Exhs. A & B; ER 77 at 276-77.

The note stated Samuelson's desire to talk to the prosecutor about petitioner's case, and promised the prosecutor that Samuelson could get for him a first degree murder conviction with "special circumstances" based on what he had to offer. The note gave a "laundry list" of seven demands^{5/} in exchange for the information, but detailed none of the information, promising only that it would be more than expected. The note further stated that Samuelson was prepared to offer information on James Mahoney, the inmate who was housed near Morales and Samuelson, as well as assistance in securing indictments on "some of North Stockton's more large volume dealers." ER C at Exh. D, ER D at Exh. B, ER 77 at 276-77.

5. The seven demands were: (1) immediate placement in the witness protection program, (2) release from custody on his own recognizance until petitioner's case went to trial and Samuelson testified, whereupon all current and pending charges would be completely dropped with no further prosecution, (3) a place for Samuelson to stay for 3 or 4 months, (4) job placement and money to support himself for 3 or 4 months or until he started getting regular pay from his job, (5) a car, (6) a new identity, and (7) an eye examination and a new pair of glasses. ER 77 at 276, ER C at Exh. D,. The prosecution gave Samuelson none of these demands.

The prosecutor responded by sending his investigator interview Samuelson the investigator on December 10, 1982, and after the investigator reported back, the prosecutor interviewed Samuelson. At that meeting the prosecutor advised Samuelson that "the best" he could do for him was "local" time in custody. ER D at Exh. A. Samuelson's handwritten note and a police report documenting the contact was turned over to the defense. ER C at Exh. D, ER D at Exh. A, ER 77 AT 238-42.

At a subsequent hearing on December 14, 1992, in Samuelson's own case, he waived his preliminary hearing, pleaded guilty in the municipal court, and the terms of the plea agreement were put on the record. The terms of the plea agreement were put on the record in open court in Mr. Samuelson's case in Municipal Court for the Stockton Judicial District in San Joaquin County on December 14, 1982. Pursuant to that on-the-record agreement, the district attorney agreed to dismiss 4 of 6 pending felony charges and would recommend that Samuelson receive felony probation and jail time of no more than one year, and that the terms of the plea agreement were not guaranteed to Samuelson. Mr. Samuelson was specifically advised by the judge at that hearing as to the non-binding nature of the agreement under California law as follows: "[i]f the Superior Court Judge in Superior Court decides after reading the probation report

that he doesn't wish to give you a year in county jail, but wanted to send you to state prison or to give you some harsher treatment than that, you would have a right to [withdraw your plea and] return here to this court." ER 77 at 247.

On February 8, 1983, the prosecutor subjected Samuelson to a polygraph examination. The examiner administered the test with the single purpose of providing the prosecutor an opinion as to whether Samuelson was being truthful in his assertion that he actually obtained the information he was providing on the case directly from petitioner himself and from no other source. The examiner then prepared a report that concluded that Samuelson was being truthful during the polygraph exam when he stated that he obtained his information directly from petitioner. The prosecutor turned over both the report and the actual polygraph readings to the defense. ER 126 at Exhs. 4-5.

Samuelson then testified for the prosecution at trial. During his direct examination, he was asked what he had been promised in return for his testimony. He answered that the prosecution "would recommend a one-year county jail sentence" as opposed to "[g]oing to state prison." ER 28 11RT 2341-42, 2371. At the time of his testimony in March 1993, Samuelson had been in custody continuously since his arrest in Arizona, and his next court date on his own case was then set for April, 1993. The jury also learned that in addition to

his six felony charges, Samuelson had two prior separate burglary convictions for which he still had unresolved probation violations pending. ER 28 11RT 2345-52, 2371.

On cross-examination, the jury learned that the district attorney's office had originally sought to send Samuelson to state prison for three years when he had picked up the second burglary case involving four counts, but was given a break by the judge who gave him probation and sentenced him to a year in county jail on the condition that he waive all prior time in custody. Samuelson admitted that at the time of his testimony he was facing a combined total of 13 years in state prison on his pending old and new offenses. Samuelson further admitted he had been in protective custody before because he was perceived by other inmates as a snitch or cop working with the prosecution, and that he had during his earlier stays in jail been a "trustee" which meant he had free roam privileges throughout the jail and had met Morales before and knew others in the jail were talking about the murder case involving Morales and Ortega. He further admitted that he had been lived in the Stockton area in early 1981, the time of the murder, and that he was in custody on a petty theft charge with Morales and Ortega at the same time their preliminary hearing was going on in March 1981, and further, and that he had met Greg Winchell in jail, the victim's brother. Samuelson revealed that he

had a "snitch jacket" and, upon his most recent arrest, had been immediately placed in protective custody to protect his physical well-being from other inmates. ER 28 11RT 2362-66,2368-70 2370-73.

On cross-examination, it was revealed that Samuelson had taken college classes in administration of justice, and further, that Samuelson viewed himself as an able jailhouse lawyer who stood a "50/50" chance of beating his own case if he went to trial representing himself. Samuelson also testified that he originally acted as a legal advisor to Morales, and that he had advised Morales regarding legal "technicalities" and had suggested to Morales possible exclusionary motions to make in court. Samuelson also admitted on cross-examination that he had seen and read portions of police various reports and transcripts that were in Petitioner's jail cell. ER 28 11RT 2352-58.

Samuelson admitted on cross-examination that the last thing he wanted was to be sent to prison with a snitch jacket, and that in prison he would be placed in protective custody segregated from everyone else. Samuelson admitted that he was interested in avoiding prison, and to that end, had written the letter to the prosecutor, guaranteeing a first degree murder conviction with "special circumstances" in this case, plus information in another murder case, and could assist in the indictment of a number of "large volume drug dealers." Samuelson

admitted that in writing the letter, he “was pulling out all stops and offering just about any sort of information” he could. Samuelson further admitted that if he got the one-year sentence contemplated by the plea agreement, he would have very little time left to serve on both his old and new cases at the time of his next court date in April. Defense counsel then ended his cross-examination with the rhetorical question that his cases had been put over until April “[t]o see how you do here.” The prosecutor did not attempt to rehabilitate Samuelson’s testimony and did not conduct any redirect examination. ER 28 11RT 2366-74.

In argument to the jury, the defense stressed that California law required the jury to view petitioner’s admission with caution and skepticism, and further, to consider Samuelson’s prior convictions in assessing his credibility. ER 28 12RT 2609-10, 2611-12. Counsel attacked Samuelson’s demeanor on the witness stand as “the essence of a . . . con man,” a “very streetwise” and “articulate” person who was attempting to ingratiate himself with the jury with a number of gratuitous comments. Counsel stressed that Samuelson’s college education in police administration and his experience as a jailhouse lawyer proved that he both knew his way around the court system and the law. Counsel asked the jury to pay close attention to the fact that Samuelson’s note to the prosecutor specifically guaranteed a first degree murder conviction with “special

circumstances,” showing that Samuelson probably looked up the elements of first degree murder and special circumstances and fabricated a story to fit this case. BR 28 12 RT 2612-15.

Counsel emphasized that Samuelson had an extremely strong motive to lie in that he had narrowly escaped going to prison on his prior convictions, and was now facing a possible 13-year prison sentence with a “snitch jacket,” but for his cooperation in this case. Counsel emphasized that Samuelson, by his own admission, was desperate to stay out of prison, and that despite testimony from Samuelson that he did not really follow anyone’s case but his own, his note to the prosecutor exposed him as extremely interested in quite a few cases. Counsel further challenged Samuelson’s claim that not much got around the jail about this case with Samuelson’s admission that the “rumors” about him being a “snitch” or a “cop” were so bad he had to put into protective custody. ER 28 12 RT 2614-15.

B. The District Court Properly Denied Petitioner's Napue Claim Because He Failed To Produce Any Evidence Below Of The Prosecutor's Knowing Use Of False Testimony Of Bruce Samuelson

Petitioner attempted below to demonstrate the prosecutor’s knowing use of false testimony by Bruce Samuelson’s based on: (1) Samuelson’s handwritten

note to the prosecutor, (2) the state court transcript of Samuelson's proposed plea agreement, (3) the prosecutor's file in Samuelson's case, (4) a 1997 polygraph report that reinterpreted the prosecutor's polygraph examination, (5) newspaper articles about petitioner's trial, (6) a 1996 declaration from James Mahoney, the inmate who was housed with both petitioner and Samuelson in 1982, (7) two declarations from two former jail inmates who knew Samuelson in 1982, (8) a 1993 interview of Bruce Samuelson, accompanied by (9) 1998 declarations from petitioner's family members. The district court rejected all of this, finding jointly and alternatively that petitioner had failed to present sufficient proof of the falsity of Samuelson's testimony or the prosecutor's knowledge of any false testimony. ER 149 at 33-34.

1. The Handwritten Note

The prosecutor in petitioner's case was also the prosecutor assigned to Bruce Samuelson's case. As noted above, Samuelson's note to the prosecutor did not reveal what he wanted to report, but only that it could "guarantee" a first degree murder conviction with "special circumstances." The note also detailed an extensive list of far-reaching demands, none of which petitioner has ever alleged were ever acceded to by the prosecution or received by Samuelson.

Nonetheless, petitioner alleged that the note's promise that Samuelson could deliver "more than you expected," evidenced a secret meeting between the prosecutor and Samuelson whereby the prosecutor supplied Samuelson with the substance of his testimony. ER 77 at 276-77.

The handwritten note suggests, at most, that the prosecutor and Samuelson had some contact previously, a fact revealed to the defense at the time of trial in the note itself and through the police report. ER 77 at 238-42, 276-77. So the note itself is insufficient proof of any "secret" meeting. Petitioner's sinister inferences also amount to conjecture and speculation that does not assist him. Std. §A.

2. **The December 14, 1982 Transcript Of Samuelson's
Plea Agreement**

As described above, the transcript of the plea agreement on December 14, 1982 reveals a specific admonition by the trial judge that Samuelson's plea agreement was not guaranteed. However, petitioner argues that Samuelson's proposed sentence was guaranteed because the sentence that precedes the admonition advised Samuelson that he would be sentenced by the Superior Court

Judge to one year in jail. ER 77 at 245-49. The two sentences, read together, can nonetheless reasonably be interpreted to mean that the district attorney would recommend a one year sentence provided it was acceptable to the trial judge, which is exactly what was revealed at trial. Petitioner's argument both ignores the reasonableness of the warden's interpretation and cannot deny it. Therefore, the transcript of the plea cannot form the evidentiary basis of any summary judgment relief for petitioner. Adickes v. S.H. Kress & Co., 398 U.S. at 157. Summary judgment motions are governed by the same legal presumptions that must be affirmatively overcome at a trial on the merits. Coca-Cola v. Overland, 692 F.2d at 1254. Thus, it is "not presume[d] that the prosecutor used false testimony," United States v. Sherlock, 962 F.2d 1349, 1364 (9th Cir. 1992); see also Smiddy v. Varney, 803 F.2d 1469, 1471 (9th Cir. 1986), and presumptions are not overcome by "merely by pointing to a silent or ambiguous record." United States v. Mulloy, 3 F.3d 1337, 1339 (9th Cir.1993). Petitioner's evidence therefore establishes neither the falsity of Samuelson's testimony nor the prosecutor's knowledge thereof.

3. The Prosecutor's File Notations

The prosecutor's file in the Samuelson case has an entry on a piece of paper describing Samuelson's waiver of his preliminary hearing on December 14,

essentially echo what the Mahoney declaration says, that the inmates did not hear petitioner confess, supplemented only by the declarant's personal opinion as to whether petitioner confessed to Samuelson. Such evidence provides proof of neither the falsity of Samuelson's testimony nor the prosecutor's knowledge of such falsity. Petitioner's speculative inferences do not assist his case. Std. §A.

Based on the foregoing, it is clear that the district court properly denied petitioner an evidentiary hearing, and summary judgment on this claim, and properly granted the warden summary judgment on this claim.

C. The District Court's Rulings Re Failure To Disclose Material Benefits Under Brady

In the district court, petitioner attempted to prove that the trial prosecutor failed to disclose material benefits conferred on Bruce Samuelson regarding the terms of his plea agreement. In particular, petitioner alleged below that Samuelson falsely testified that he had been promised a recommendation of a one-year jail sentence on one count of his new criminal case, as opposed to a guaranteed one-year jail sentence on two counts in the new case, and a reinstatement of probation on the existing probation violation cases. The district court found that petitioner had failed to establish a reasonable probability of a

different result in view of what the jury knew about Samuelson, and the defense counsel's extensive cross-examination. ER 149 at 29-32.

D. The District Court Properly Denied Petitioner's Brady Claim Re Bruce Samuelson The Alleged Non-Disclosures Were Not Material

First, it is difficult to understand how a failure to disclose details about a greater number of criminal charges a witness will be asked to plead to, increases a defendant's ability to impeach the witness. A witness' hope for a more favorable criminal disposition, not a lesser one, has impeachment value. By the same token, it is difficult to understand how a failure to disclose a witness' guaranteed one-year sentence, as compared to a possible one-year sentence, increases a defendant's ability to impeach the witness. Here, one of defense counsel's undeniable messages to the jury through cross-examination was that Samuelson could only hope to get the one-year sentence based on "how you do here." ER 28 11RT 2373. Without any contingency, defense counsel would have been deprived of his eventual argument to that Samuelson desperately sought to curry favor with the prosecution and the jury in hope of getting his recommended sentence imposed. Finally, the defense actually asserted through cross-examination, and Samuelson admitted through his

testimony that he *would* soon be released from custody on all his charges, if he got the deal that had been promised to him. ER 28 11RT 2612-15. So any failure on the prosecutor's part was cured by defense counsel's further questioning.

None of these allegations, taken together, establish a reasonable probability of a different result. As described by the warden above, and as found by the district court, artfully challenged Samuelson's credibility at trial. The prosecutor even conceded to the jury that Samuelson might have been lying. ER 28 12RT 2664. He argued, however, that there was more than sufficient proof of petitioner's guilt even without Samuelson's testimony. ER 28 12RT 2664. Because "[t]he government's case did not rise or fall on [the witness's] credibility," United States v. Cooper, 173 F.3d 1192, 1203 (9th Cir. 1999), petitioner's evidence was not material. Samuelson's testimony clearly was not "the only evidence linking the defendant to the crime," United States v. Payne, 65 F.3d 1200, 1210 (2d Cir. 1995), "the only evidence of an essential element of the government's case," United States v. Marshall, 56 F.3d 1210, 1211 (9th Cir. 1995), or "the difference between conviction and acquittal." Bagley v. Lumpkin, 798 F.2d 1297, 1300 (9th Cir. 1986), aff'd in part, rev'd in part on other

grounds, 837 F.2d 371 (9th Cir. 1988), cert. denied, 488 U.S. 924 (1988).

Petitioner's contention fails.

E. The State Court Proceedings Re Raquel Cardenas

Raquel Cardenas was petitioner's sixteen-year-old at the time of the murder in this case. Petitioner was twenty-one. Cardenas was petitioner's girlfriend at the time, and on the morning of January 10, 1982, a day and a half after the murder, police arrested her in the company of petitioner at petitioner's residence. She had in her purse at the time a knife that was believed to be one of the murder weapons, which petitioner had given her the night before. ER 28 10RT 2049, 2068-69.

That day, she was put into juvenile custody and charged with being an accessory after the fact to Terri Winchell's murder. On the first day of her arrest, Cardenas did not admit any knowledge of the murder. After spending one night in juvenile hall, Cardenas admitted to police that petitioner had told about the murder and described what happened at petitioner's residence on the night of the murder. ER 28 10RT 2069-70, 2094-99.

Cardenas twice testified for the prosecution at the preliminary hearing held in March 1992. She also testified for the prosecution at the trial held in